

**Sac and Fox Industries, Ltd. and Patricia Maxson,  
Petitioner and United Garment Workers of  
America, Local 427, AFL-CIO. Case 17-RD-  
1192**

April 24, 1992

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On April 24, 1990, the Regional Director for Region 17 issued an order dismissing the petition in the above-entitled proceeding on the ground that the Employer, Sac and Fox Industries, Ltd., is owned and controlled by the Sac and Fox Indian Tribe, and is therefore implicitly exempt as a governmental entity within the meaning of the Act.

Thereafter, on May 4, 1990, the Union filed a timely request for review of the Regional Director's order.<sup>1</sup> The Union contended, inter alia, that the Regional Director's order was not supported by Board precedent, and that to the extent Board precedent may be determined to apply, it is incorrect and should be overruled. The Union contended that the Board should assert jurisdiction and that the decertification petition should be dismissed instead on the ground that it was untimely.

By telegraphic order dated February 21, 1991, the Board granted the Union's request for review. The Board requested that the parties submit briefs on the jurisdictional issue, and also served notice of the order on the AFL-CIO, the Chamber of Commerce, and the U.S. Department of Interior, Bureau of Indian Affairs for statements of position on the issue.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in the proceeding, including the briefs submitted by the parties and the statement of position submitted by the Department of Interior.<sup>2</sup> For the reasons set forth below, we reverse the Regional Director and assert jurisdiction.<sup>3</sup>

Sac and Fox Industries, Ltd. (SFI) is a nonprofit corporation wholly owned by the Sac and Fox Indian Tribe of Oklahoma (the Tribe). Its corporate office is located at Stroud, Oklahoma, the Tribe's national cap-

ital. The corporation is operated by the Sac and Fox Industrial Development Commission (the Commission), a Tribal agency created in 1983 by the Tribe's business committee for the purpose, inter alia, of providing revenues for and developing economic and industrial activities on behalf of the Tribe.<sup>4</sup> The Commission was specifically authorized to use the name "Sac and Fox Industries, Ltd." in any of its business activities within or without the Tribal jurisdiction, and a certificate of incorporation was issued to the Commission in that name by the Tribal secretary in 1985. The Commission is managed by a five-member board of directors, the majority of whom must be Tribal members, appointed by the Tribe's principal chief with the advice and consent of the business committee.

Sometime between October 1, 1988, and September 30, 1989, SFI secured a contract with the U.S. Department of Defense (DOD) valued at close to \$30 million for the manufacture of 490,915 chemical resistant suits. In order to perform this contract, between late 1989 and 1990 SFI acquired and/or opened facilities in four Oklahoma towns, including facilities in Commerce, Oklahoma, the facilities involved in the instant proceeding.<sup>5</sup>

Unlike SFI's corporate office, the Commerce facilities are located some distance from the Tribal reservation land.<sup>6</sup> The facilities became available when the

<sup>4</sup> The Tribe's business committee is comprised of the Tribe's principal chief, second chief, secretary, treasurer, and one Committee member who is elected by secret ballot. The Tribal constitution provides that the business committee shall have the power to transact business and otherwise speak and act on behalf of the Tribe in all matters on which the Tribe is empowered to act, subject in certain specified circumstances to the approval of the governing council, the supreme governing body of the Tribe composed of all Tribal members 18 years of age and older.

<sup>5</sup> The other facilities are in Cushing, Idabell, and Temple, Oklahoma.

<sup>6</sup> Our finding that the Commerce facilities are located off the Sac and Fox Indian reservation is based on the following. First, according to James Branum, the president of SFI, the Tribal reservation includes an area from Stroud that goes approximately 40 miles to the north, approximately 40 miles to the south, about 35 miles to the west, and about 15 miles to the east. In contrast, Branum testified that it took nearly 3-1/2 hours to drive from Stroud to Commerce. (We take administrative notice, based on the Rand McNally Road Atlas map of Oklahoma, that Commerce is approximately 135 miles northeast as the crow flies from Stroud.) Further, Branum specifically testified that the Commerce facilities are not on "what was the original Sac and Fox reservation," and that even though SFI acquired the real estate as well as the structure and equipment in Commerce, he did not believe that the Commerce facilities would at that time be perceived as part of the reservation. Finally, no party has excepted to the Regional Director's finding that the Commerce facilities are located some distance from the reservation. Although SFI states in its brief in opposition to the Union's request for review that the Commerce facilities are located within the Quapaw Indian reservation (a statement which in itself would appear to confirm that they are not within the Sac and Fox reservation), the record is inconclusive on this point and we have been unable to locate any public or other readily available documents verifying SFI's statement.

<sup>1</sup> In the interim, on April 30, 1990, the Union also filed a motion for reconsideration with the Regional Director. The Regional Director denied the motion by order dated May 11, 1990.

<sup>2</sup> The Department of Interior's position statement (arguing that the Board may properly assert jurisdiction) was submitted by the Acting Associate Solicitor for the Division of Indian Affairs. The AFL-CIO and the Chamber of Commerce did not submit position statements.

<sup>3</sup> Whether the decertification petition should nevertheless be dismissed as untimely as contended by the Union, we will leave to the Regional Director to address in the first instance on remand. I. Findings of Fact

former owner, the Francis E. Heydt Co. and its subsidiary Dumas Manufacturing Company (Heydt), was debarred from competing for government contracts. According to President Branum, although there was debate among the Commission's board of directors and among Tribal members about locating a Tribal enterprise at such a distance, it was ultimately decided that the Commerce facilities were a buying opportunity that SFI should pursue.

SFI hired Heydt's former plant manager to be the manager of the Commerce facilities. Former Heydt employees also made up the majority of SFI's initial work force at the Commerce facilities. According to Branum, himself a nonmember of the Tribe, only a handful at most of the 90–100 production, shipping, and warehouse employees hired at the Commerce facilities as of March 1990 were Tribal members, and neither the manager nor any of the supervisors at the Commerce facilities were Tribal members, although some of the supervisors were members of other Indian tribes. Branum testified that the reason these individuals were hired rather than Sac and Fox members was because they were already trained and had the necessary experience,<sup>7</sup> and because there were not many Sac and Fox members in the Commerce area. Once some Sac and Fox members became trained and obtained some experience at SFI's other facilities, Branum testified, they would be relocated to Commerce.<sup>8</sup> Branum testified that the Board of Directors was adamant that Tribal members would also eventually ascend into management positions throughout the facilities as they obtained the necessary experience.

According to Branum, the Commission's board of directors reviewed the labor cost projections during its review of the DOD contract bid, and has authorized up to a certain amount of money for such costs. Branum testified that the board of directors also specifically decided to continue paying employees at an individual piece rate, although he himself set the exact amounts based on the advice of his managers and some engineering and economic analyses.<sup>9</sup> According to Branum, all employees are paid out of the same Com-

mission bank account, and any revenues beyond those needed for the ongoing operation inure to the benefit of the Tribe and are appropriated by the business committee or the governing Council as they see fit.

With respect to labor relations policies, Branum testified that the board of directors retains the ultimate authority, and that any labor agreement would require its approval.<sup>10</sup> However, Branum testified that he actually formulated and administered labor policy for the employees at the Commerce facilities based on the recommendations of the plant manager. Branum also testified that the plant manager had the authority to make various day-to-day personnel decisions including, subject to certain possible exceptions,<sup>11</sup> the hiring, firing, and transferring of employees and supervisors.

## II. ANALYSIS AND CONCLUSIONS

The sole issue presented for review in this proceeding is whether the Board lacks jurisdiction over SFI at its Commerce, Oklahoma facilities because, as outlined above, SFI is wholly owned and controlled by the Sac and Fox Indian Tribe and its agency, the Sac and Fox Industrial Development Commission.<sup>12</sup> As discussed below, we find that the Regional Director erred in finding that SFI was exempt from jurisdiction; that the cases he relied on are distinguishable on their facts; and that applying the rules and standards established, adopted, and/or approved by the Supreme Court and the courts of appeal, it would effectuate the purposes and policies of the Act to assert jurisdiction over SFI in the instant proceeding.

In finding SFI exempt as a governmental entity within the meaning of the Act, the Regional Director relied on two prior Board decisions in which the Board had declined to assert jurisdiction over tribal enterprises: *Fort Apache Timber Co.*, 226 NLRB 503 (1976), and *Southern Indian Health Council*, 290 NLRB 436 (1988). Both cases are clearly distinguishable. In both cases the tribal enterprises were located on the reservation, a fact repeatedly stressed by the Board in finding that the assertion of jurisdiction

<sup>7</sup>The parties stipulated that the former Heydt employees hired at the Commerce facilities do significantly the same kind of work they previously did.

<sup>8</sup>In contrast to the low Tribal employment at SFI's Commerce facilities, Branum testified that there was 96-percent Tribal employment at SFI's Cushing plant. Branum testified that SFI currently had some Tribal members in training at the Cushing plant to be relocated to Commerce.

<sup>9</sup>In setting the amounts, Branum testified that he is guided by the board of directors' direction, in so many words, that he should "be right by the employees and take care of them." In accordance with this direction, Branum testified that he had recently pronounced that Good Friday would be a paid holiday for all SFI employees. Branum acknowledged, however, that SFI did not as yet offer its employees any life or health insurance, retirement plan, vacations, or other kinds of fringe benefits.

<sup>10</sup>It is undisputed that the Union represented Heydt's former production, shipping, and warehouse employees and truckdrivers at the Commerce facilities, and that it had a labor agreement with Heydt covering these employees at the time SFI acquired the facilities. Although SFI and the Union disagree over whether SFI agreed or had an obligation to adopt the Heydt agreement, they stipulated that on or about March 2, 1990, SFI agreed to commence negotiations with the Union pursuant to a settlement of the Union's unfair labor practice charges against SFI. According to Branum, the first negotiating session with the Union occurred on April 4, 1990.

<sup>11</sup>For example, Branum testified that the plant manager's authority to discharge an employee might depend on the situation. Branum also testified that the plant manager would confer with him over certain high-level promotions.

<sup>12</sup>The Union's request for review does not dispute, and we find based on the facts as set forth above, that the board of directors of the Commission exercises significant control over SFI's employment policies.

would interfere with the tribes' powers of internal sovereignty.<sup>13</sup> Thus, while it is true that in both cases the Board ultimately concluded that the tribal enterprises were implicitly exempt as governmental entities within the meaning of the Act, neither case is directly controlling in this case where the subject facilities are located well outside the Tribal reservation.<sup>14</sup>

Further, we find that the result reached in *Fort Apache* and *Southern Indian Health Council* would be inappropriate in this case. The general rule of construction for determining whether a Federal statute covers Indians and their property interests was set forth in the Supreme Court's opinion in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). In *Tuscarora*, the Court was asked to decide whether certain nontreaty lands purchased and owned in fee simple by the Tuscarora Indian Nation could be taken for a hydroelectric power project, upon payment of just compensation, by the New York Power Authority under the provisions of the Federal Power Act. In holding that such a taking was permitted, the Court rejected the Tuscarora Tribe's argument that the Federal Power Act, being only a general Act of Congress, did not apply to Indians or their lands. Citing prior decisions in which the Court had upheld the application of the Internal Revenue Act to Indians, the Court stated: "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116.

Although there is some disagreement among the courts whether this rule should apply to Indian property interests that are on treaty or reservation lands as well as those that are on nontreaty lands,<sup>15</sup> we find

that it is clearly applicable in the instant circumstances. As indicated above, SFI's Commerce facilities are not on the Sac and Fox reservation, and there is no contention that the land underlying those facilities is protected by a treaty between the Sac and Fox Nation and the Federal Government. Further, there is little question that the NLRA is a statute of general applicability. Like various other Federal employment-related statutes which have been held to be of general applicability,<sup>16</sup> the NLRA's jurisdictional definitions of "employer," "employee" and "commerce" are of "broad and comprehensive scope,"<sup>17</sup> containing only a few specified exemptions.<sup>18</sup> Nowhere in the list of exemptions or elsewhere in the statute is there any mention of Indians or their off-reservation enterprises.<sup>19</sup> Thus, the *Tuscarora* rule clearly applies, and contrary to the result in *Fort Apache* and *Southern Indian Health Council* in which the tribal enterprises were located on the reservation, we cannot conclude in this case that SFI is exempt from the coverage of the Act at its Commerce facilities merely because those facilities are owned and controlled by the Tribe.

This is only the beginning and not the end of our analysis, however. In the years following *Tuscarora*, the circuit courts have recognized several exceptions to the general rule in that case. As the Ninth Circuit stated in *Donovan v. Coeur d'Alene Tribal Farm*, supra at 1116:

*Tuscarora* in holding that the NLRA applied to a private corporation operating a uranium concentrate mill on the tribal reservation under a lease agreement with the tribe).

<sup>16</sup> See *Donovan v. Coeur d'Alene Tribal Farm*, supra (OSHA); and *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, supra; and *Smart v. State Farm Insurance Co.*, supra (ERISA).

<sup>17</sup> *Navajo Tribe v. NLRB*, supra at 165 fn. 4. See also *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986) (noting, in upholding the Board's assertion of jurisdiction over a foreign-government instrumentality doing business in the U.S., that "in passing the [NLRA], Congress intended to and did vest in the [Board] the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." [Citations omitted.] [Emphasis in original.]

<sup>18</sup> See Sec. 2(2), (3), and (6) of the Act. The only exemptions specified in Sec. 2(2)'s definition of "employer" are: "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

<sup>19</sup> We reject SFI's argument that the NLRA's silence in this regard actually distinguishes this case from *Tuscarora*, rendering the rule set forth in that case inapplicable. It is true that the statute involved in *Tuscarora* specifically dealt with Indians and their lands, and that the Court's statement in that case regarding the application of general statutes could therefore be characterized as dictum. However, as indicated above, it is dictum that was supported by prior Court decisions involving the Internal Revenue Act, decisions in which the Court had made no mention of any provision in the subject statute addressing Indians. Moreover, it is dictum that has guided many subsequent decisions of the circuit courts. See cases cited at fn. 15, supra.

<sup>13</sup> See *Fort Apache*, supra at 505-506; *Southern Indian Health Council*, supra at 437.

<sup>14</sup> See generally *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (noting, in holding that the State of New Mexico could tax a tribal ski resort located off the reservation, that "tribal activities conducted outside the reservation present different considerations"). Accordingly, inasmuch as we find that *Fort Apache* and *Southern Indian Health Council* are clearly distinguishable, we find it unnecessary in this case to address the Union's alternative argument that those cases were incorrectly decided and should be overruled.

<sup>15</sup> Compare *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (holding that *Tuscarora* rule was limited or by implication overruled at least to the extent that it could be read to apply to treaty or reservation lands by the Supreme Court's later decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and that OSHA therefore did not apply to a tribal enterprise located on reservation lands which were specifically protected by treaty from intrusion by unauthorized non-Indians) with *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683 (9th Cir. 1991); and *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989) (applying *Tuscarora* rule in holding that OSHA and ERISA, respectively, applied to tribal enterprises located on reservation lands). See also *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961), cert. denied 366 U.S. 928 (1961) (citing

There are, however, three exceptions to [the *Tuscarora*] principle. A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches “exclusive rights of self-governance in purely intramural matters”; (2) the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .” [Citations omitted.] In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

See also *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, supra; *Smart v. State Farm Insurance Co.*, supra at 932–933; and *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462–1463 (10th Cir. 1989) (citing *Coeur d’Alene* and applying some or all of same three exceptions). Before affirmatively concluding that the Board may assert jurisdiction over SFI in this proceeding, we consider each of these exceptions in turn.<sup>20</sup>

(1) *Whether the NLRA “touches exclusive rights of self-governance in purely intramural matters.”* In evaluating whether the application of a statute to a tribal enterprise would interfere with the tribe’s rights of self-government in purely intramural matters, the courts have considered several factors. Thus, for example, they have considered whether the tribal enterprise is a normal commercial enterprise operating in interstate commerce, and whether it employs non-Indians as well as Indians.<sup>21</sup> In addition, they have considered whether the statute would broadly and completely define the employment relationship between the tribe and the employees, thereby usurping the tribe’s decision-making power, or would simply impose certain regulatory requirements and standards for the employees’ protection.<sup>22</sup> Finally, they have considered whether the statute’s effects would extend beyond the activity of the business enterprise to regulate purely intramural

matters such as tribal membership, inheritance rules, or domestic relations.<sup>23</sup>

Applying these factors, we find that application of the NLRA to SFI at its off-reservation Commerce facilities would not interfere with the Sac and Fox Tribe’s rights of self-government in purely intramural matters. First, as indicated above, SFI is engaged in a normal manufacturing operation at those facilities,<sup>24</sup> and all but a handful of its initial work force, a majority of which had been employed by the previous non-Tribal employer at the facilities doing substantially the same kind of work, were not Tribal members. Second, the NLRA would not broadly and completely define the relationship between SFI and its employees. The NLRA encourages the practice and procedure of collective bargaining and protects workers’ rights of freedom of association and self-organization. It does not, however, actually compel any agreement between the employer and the employees; nor does it regulate the substantive terms incorporated in an agreement.<sup>25</sup> Finally, the NLRA’s effects would not extend beyond the Tribe’s business enterprise to regulate purely intramural matters such as Tribal membership, inheritance rules, or domestic relations.

(2) *Whether application of the NLRA would “abrogate rights guaranteed by Indian treaties.”* SFI has failed to identify, and our own review has not discovered, any specific provision in any of the numerous treaties between the Sac and Fox Nation and the Federal Government that would prohibit application of the NLRA to an off-reservation Tribal enterprise.<sup>26</sup> Fur-

<sup>23</sup> See *Donovan v. Coeur d’Alene Tribal Farm*, supra at 1116 (holding that the tribal self-government exception was intended to be limited to such matters).

<sup>24</sup> The fact that SFI may be “nonprofit” and sells all of its manufacturing product to the Department of Defense, is not a basis for distinguishing it from other manufacturers subject to the Act. See generally *Woods Hole Oceanographic Institution*, 143 NLRB 568 (1963). See also *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976). Further, SFI stipulated at the hearing to facts establishing that it meets the Board’s “commerce” standards for asserting jurisdiction.

<sup>25</sup> *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). The employer’s bargaining obligation under the Act is only to bargain in “good faith.” This includes the obligation to meet at reasonable times with the employees’ representative and confer in good faith over wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and to execute a written contract incorporating any agreement reached if requested. See Sec. 8(d) of the Act. It also includes the obligation to provide relevant and necessary information requested by the employees’ representative. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

<sup>26</sup> Although SFI introduced at the hearing a bound collection of treaties and agreements between the Sac and Fox Nation and the Federal Government (Exh. 1), it did not identify any provision in that document which it contended would bar application of the NLRA to an off-reservation Tribal enterprise. Nor has our own review of that document revealed any provision which, even under its most liberal construction, could be so construed.

<sup>20</sup> We recognize, as is obvious from the last of the exceptions itself, that these exceptions were developed in cases involving Indian or tribal activities on the reservation. Nevertheless, as suggested by the position statements submitted by the Union and the Department of Interior, we find that they may constructively be applied in analyzing the propriety of asserting jurisdiction over off-reservation tribal activities as well. We express no opinion, however, whether we are required to apply them in the latter situation.

<sup>21</sup> See *Donovan v. Coeur d’Alene Tribal Farm*, supra at 1116.

<sup>22</sup> See *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, supra at 685; and *Smart v. State Farm Insurance Co.*, supra at 935–936.

ther, as previously indicated, there is no contention that the land underlying the Commerce facilities is itself protected by a treaty between the Sac and Fox Nation and the Federal Government. Accordingly, we find that application of the NLRA to SFI at those facilities would not abrogate any Tribal rights guaranteed by treaty.

(3) *Whether there is proof “by legislative history or some other means” that Congress intended the NLRA not to apply to an off-reservation tribal enterprise.* SFI has not referred us to, and we are not aware of, any discussion whatsoever in the legislative history of the NLRA dealing with Indians. Nor is there any basis in the language of the Act itself for inferring a Congressional intent to exempt Indians or their off-reservation tribal enterprises. Although the Board’s decision in *Fort Apache*, supra, contains statements to the contrary, as previously indicated we read that decision as limited to situations in which the tribal enterprise is located on the reservation. To the extent our dissenting colleague reads the *Fort Apache* decision more broadly, finding in it an intent to exempt Indian tribes as governmental entities regardless of where they are doing business, we respectfully disagree. Contrary to our dissenting colleague, we believe the only fair reading of that decision is that the enterprise’s location on the reservation was of controlling significance to the Board. Indeed, the phrase “on the reservation” or its equivalent appears no less than 10 times over the course of the Board’s 4-page opinion—most significantly, in the penultimate sentence of the text where the Board sets forth its holding. Further, even if true, as our dissenting colleague would read it, that *Fort Apache* did in fact hold that all enterprises owned by governmental entities are exempt from the Act whenever they do business, this holding was implicitly overruled less than a year later when the Board decided to assert jurisdiction over foreign-government instrumentalities that do business within the territorial jurisdiction of the United States.<sup>27</sup> Our dissenting colleague finds such cases “different” on the apparent ground that, unlike foreign governments, Indian tribes are entitled to an advantage in competing with private companies. We decline to endorse such a proposition in the absence of a clear statutory mandate. The Act’s exemption in Section 2(2) for a “political subdivision” of a “State” does not clearly include an off-reservation tribal enterprise. Accordingly, we find that application of the NLRA to SFI in this proceeding would not be contrary to Congressional intent.

Finally, SFI and our dissenting colleague, respectively, argue that the Board should decline jurisdiction because: (1) the Board would be barred by the Tribe’s

common-law sovereign immunity from obtaining court enforcement of its orders against SFI, and (2) as a practical matter, the Board should not assert jurisdiction at the Tribe’s off-reservation Commerce facility when the Board may not at the same time be asserting jurisdiction at similar on-reservation facilities that are also owned and controlled by the Tribe.

We reject both arguments. First, as domestic dependent sovereigns, Indian tribes have no sovereign immunity against the superior sovereign, the United States.<sup>28</sup> Thus, SFI’s contention that the Board would be unable to obtain court enforcement of its orders against SFI is simply incorrect.<sup>29</sup> Second, we do not find it particularly significant to our decision in the instant case regarding SFI’s Commerce facility that some of SFI’s other facilities may be located on the reservation. Even assuming arguendo that our dissenting colleague is correct that the Board would not assert jurisdiction over SFI at such on-reservation facilities, this is not a basis for declining jurisdiction over SFI at its off-reservation Commerce facility.<sup>30</sup>

Accordingly, for all the foregoing reasons, in agreement with both the Union and the Department of the Interior we find that the Board has jurisdiction in the instant proceeding.<sup>31</sup>

## ORDER

It is ordered that the instant proceeding be remanded to the Regional Director for Region 17 for further appropriate action consistent with this Decision on Review.

MEMBER DEVANEY, dissenting.

I agree with the Regional Director and would not assert jurisdiction over the Tribal enterprise here, in accordance with the principles enunciated in *Fort Apache Timber Co.*, 226 NLRB 503 (1976) and *Southern Indian Health Council*, 290 NLRB 436 (1988). I view the majority decision asserting jurisdiction in this case as seriously undermining the continued viability of our prior precedent.

In those cases, the Board declined to assert jurisdiction over wholly Indian-owned and controlled enterprises located on reservations. In *Fort Apache*, the Board’s lead case in the area, the Board framed the issue as “whether an Indian tribal governing council *qua* government, acting to direct the utilization of trib-

<sup>27</sup> See *State Bank of India*, 229 NLRB 838 (1977). See also *State Bank of India*, 262 NLRB 1108 (1982); and *State Bank of India*, 273 NLRB 267 (1984), enf.d. 808 F.2d 526 (7th Cir. 1986).

<sup>28</sup> See *U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), cert. denied 485 U.S. 935 (1988); and *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), cert. denied 481 U.S. 1069 (1987).

<sup>29</sup> We therefore find it unnecessary to decide whether the Tribe has waived its sovereign immunity.

<sup>30</sup> Cf. *State Bank of India* cases, supra (asserting jurisdiction over foreign-government instrumentality at its American branch offices).

<sup>31</sup> Member Raudabaugh did not participate in the decisions in *Fort Apache* and *Southern Indian*. He expresses no opinion as to whether he agrees with the decisions in those cases.

al resources through a tribal commercial enterprise on the tribe's own reservation, is an 'employer' within the meaning of the Act." *Fort Apache* at 504. The Board concluded that the tribal council was akin to a state or government, and thus the tribal enterprise was implicitly exempt from the definition of "employer" under Section 2(2) of the Act because it came within the political subdivision exception.<sup>1</sup> Specifically, the Board used the well-established test set forth in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), to conclude that the enterprise did not meet the Board's statutory definition of "employer" as it is a government entity administered by individuals responsible to the tribal council.<sup>2</sup>

The majority rejects the application of *Fort Apache* to this case because it believes that the fact that the facility here is not on the reservation is dispositive.<sup>3</sup> I find no support in Board law for this distinction. No case directly addresses the unique set of facts presented here where a tribal entity completely owns and controls a facility located outside the reservation, but I view the holding of *Fort Apache* as providing firm support for a refusal to assert jurisdiction. The thrust of both *Fort Apache* and *Southern Indian Health Council* is that the tribal enterprises were found to be exempt as government entities within the meaning of

Section 2(2) of the Act under the *Hawkins* test. That test focuses on the identity of the party controlling the enterprise, consistent with the statutory mandate that the Board not interject itself into the labor relations of government entities. Thus, because the tribal enterprises in *Fort Apache* and *Southern Indian Health Council* were administered by individuals responsible to the tribes, the enterprises were found to be exempt. Similarly, the enterprise here, although located off the reservation, is certainly owned and controlled by individuals responsible to the Tribe. Thus, the enterprise would clearly come within the literal language of the *Hawkins* test.

The majority finds significant several references in *Fort Apache* and *Southern Indian Health Council* to the fact that the enterprises involved in those cases were located on the reservations. However, a fair reading of those decisions demonstrates that this fact is not controlling. Rather, the Board was concerned with the question of "whether an action impinges on the independence of individual Indians on a reservation or on the governing body of the tribe," (emphasis added) with the test being "whether an action 'infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Fort Apache* at 502; emphasis in original, footnote omitted. Thus, although in *Fort Apache* the Board made reference to the fact that the enterprise was located on the reservation, it was concerned with the issue of whether the independence of the tribe or the reservation Indians was being compromised. Limiting this inquiry to enterprises geographically located on tribal land does not give sufficient deference to the self-government policy concerns that were a principal foundation of *Fort Apache* and *Southern Indian Health Council*.

The majority eschews the Board's *Fort Apache* precedent in favor of the general rule of construction set forth in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and finds that the Act is a statute of general applicability with jurisdictional definitions broad enough to include Indians and their off-reservation enterprises. However, the majority concedes that the general rule articulated in *Tuscarora* has no applicability where a statute's jurisdictional definitions specifically exclude Indian tribes and enterprises. I believe the Act does contain such a specific exclusion in the definition of employer in Section 2(2), as interpreted by *Hawkins*, and *Tuscarora* is therefore inapposite here.

My colleagues make much of widespread application of *Tuscarora* to a variety of statutes. I view these cases as distinguishable because none of those statutes contained language such as that in Section 2(2) of the Act, as interpreted under *Hawkins*. This distinction was recognized by the Ninth Circuit Court of Appeals in *Confederated Tribes of Warm Springs Reservation v.*

<sup>1</sup> After an extensive analysis and review of the legal status of Indian Americans, the Board noted the unique character of Indian nations as resembling states in many ways, although not so precisely defined. Although it did not strictly analogize the tribal council to a state, the Board concluded in *Fort Apache* that there was sufficient government control over the tribal enterprise to bring it within the purview of the *Hawkins* test. It stated that "[r]egardless of the particular label applied . . . it is clear beyond peradventure that a tribal council such as the one involved herein—the governing body on the reservation—is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." *Fort Apache* at 506, footnotes omitted. The Ninth Circuit, in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1163 (9th Cir. 1990), similarly viewed Indian tribes, although not technically states, as like states in their presence within the United States as units of government. Other cases, such as *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989), have described tribes as distinct, independent, political communities but without the full attributes of sovereignty.

<sup>2</sup> Sec. 2(2) defines the term "employer" to exclude "any State or political subdivision thereof." The Act does not define a political subdivision. The Board has historically defined "political subdivision" consistent with the *Hawkins* test to apply to any entity which is either created directly by the State so as to constitute a department or administrative arm of government, or administered by individuals who are responsible to public officials or the general electorate.

<sup>3</sup> The Board declined to apply *Fort Apache* in another case, *Devils Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979), but that case was clearly factually distinguishable from this one. *Devils Lake Sioux Mfg. Corp.*, involved a nontribal employer which leased reservation property. The Board in that case relied on the clear distinction between a nontribal enterprise and *Fort Apache*, which involved a wholly owned tribal enterprise completely directed by the tribal council. The council in *Fort Apache* contracted with a nontribal individual for management services as did the Sac and Fox Industrial Development Commission at issue here.

*Kurtz*, 691 F.2d 878, 880 fn. 1 (9th Cir. 1982). In holding that an Indian tribe was not exempt from application of the Internal Revenue Code as a state or political subdivision, the court rejected the tribe's reliance on the Board's *Fort Apache* decision as support for its exemption from the Federal tax laws. I note that the court did not reject the Board's approach, but rather found *Fort Apache* inapposite because classifications under Federal labor laws are not controlling in tax cases. Significantly, the court noted that the Board had made its finding that the Indian tribe had sufficient government attributes to qualify under the National Labor Relations Act's broad government exemption provision, which it found to be more inclusive than the tax law provision before it. Thus, notwithstanding the court decisions cited by the majority applying *Tuscarora* I would not abandon the Board's sensible precedent tailored to its special needs and statutory requirements.<sup>4</sup>

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<sup>4</sup> Although the Department of the Interior's Division of Indian Affairs has submitted a position statement asserting that the Regional Director was incorrect under a *Tuscarora* analysis, I view the Board and not the DIA as the expert in analyzing the Act's jurisdictional provisions.

There are also strong policy reasons against asserting jurisdiction in this case. The spirit of the Board's *Fort Apache* decision clearly is to allow tribal enterprises to operate freely without Board intervention. I do not believe the majority view complies with the spirit of that decision. In this regard, this case is different than cases involving, for example, foreign governments, in which the Board policy has been not to allow commercial enterprises owned by such governments to gain an advantage in competing with private sector companies.

The record also indicates that at least one of the Tribal enterprise's other plants is located within the territorial limits of the Sac and Fox Reservation, in Cushing, Oklahoma. From my perspective it does not make practical sense for the Board to assert jurisdiction with respect to the Commerce, Oklahoma facility when it is not asserting jurisdiction over similar facilities with identical ownership and control solely on the basis of geographic location. Regardless of the location of the facility, the Board is entangling itself in the operation of the same Tribal enterprise.

In sum, I believe it would not effectuate the purposes and policies of the Act to assert jurisdiction here. Therefore I respectfully dissent.